Re Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, Petitioners)

HIGH COURT (PENANG) — COMPANIES WINDING-UP NO 28(42)–30–85
MOHAMED DZAIDDIN J
30 APRIL 1991

Companies and Corporations — *Winding-up — Scheme of arrangement with judgment creditors — Creditor having benefit of letter of guarantee provided by company and security provided by another party — Whether creditor a secured or contingent creditor — No action commenced by creditor — Security not realized — Whether different class from judgment creditors — Whether creditor entitled to participate in proposed scheme — Companies Act 1965 s 176*

Words and Phrases — *'Creditors' — Companies Act 1965 s 176(1)*

A winding-up petition was brought against the respondent company ('the company'). In the proceedings, an application was made to the court under s 176 of the Companies Act 1965 ('the Act') for an order sanctioning a scheme of arrangement between the company and its creditors or any class of them, including the petitioners, whereby each of the creditors would accept in full and final discharge and satisfaction of his debt as admitted or established a cash composition equal to 35 cents in every ringgit of such debt as the same would have been provable had the company been placed in an insolvent winding-up.

One of the creditors, MUI Finance Bhd ('MUI'), claimed to be an unsecured creditor of the company by virtue of a letter of guarantee executed by the company guaranteeing the repayment of moneys due in respect of credit facilities granted to a company called Bagan Town Development Sdn Bhd ('Bagan Town'). MUI's participation in the proposed scheme of arrangement was objected to by the company on the ground that MUI did not come within the same class of creditors as the petitioners and other judgment creditors within the meaning of s 176(1) of the Act. It was contended for the company that MUI was unlike the other creditors, who were all judgment creditors, because it was a secured creditor under a legal charge of properties given by Bagan Town, and that the facilities granted to Bagan Town were further secured by the letter of guarantee given by the company. It was further submitted for the company that MUI's recourse was to apply for an order for sale of the charged properties under s 256 of the National Land Code 1965, and that until it commenced such proceedings it could not participate in the proposed scheme of arrangement. MUI had also not commenced an action against the company founded on the letter of guarantee. It was submitted for MUI, inter alia, that it was a contingent and/or an unsecured creditor of the company.

Held, dismissing the objection:

(1) MUI was a contingent creditor of the company because under the letter of guarantee the company was obliged to pay MUI on

demand whatever sum owing by Bagan Town as the principal borrower. Although MUI had yet to commence an action to recover the debt owed under the guarantee, in law it had a pecuniary claim against the company.

(2) The word 'creditors' embraces all persons with claims which would be entitled to be admitted to proof if the company were wound up. The word should be interpreted in the widest sense.

(3) There was no difference between MUI as a contingent creditor and the rest of the creditors, who were judgment creditors. Their respective rights were not dissimilar.

[Bahasa Malaysia summary

Satu petisyen penggulungan telah dibawa terhadap syarikat penentang ('syarikat itu'). Di dalam prosiding itu, permohonan telah dibuat kepada mahkamah di bawah s 176 Akta Syarikat 1965 ('Akta itu') untuk perintah mengiktiraf skim persetujuan antara syarikat itu dan pemiutangnya atau sebarang klas pemiutang, termasuk pempetisyen, dengan mana setiap pemiutang akan menerima sebagai pelepasan dan penyelesaian yang penuh dan terakhir hutangnya seperti yang diterima atau dibuktikan satu komposisi wang tunai bersamaan dengan 35 sen dalam setiap ringgit hutang tersebut seperti mana hutang tersebut boleh dibuktikan jika syarikat itu telah ditempatkan dalam penggulungan ketaksolvenan.

Satu daripada pemiutang itu, MUI Finance Bhd ('MUI'), telah mendakwa bahawa ianya pemiutang syarikat itu yang tidak bercagar mengikut surat jaminan yang dilaksanakan oleh syarikat itu untuk menjamin pembayaran balik wang yang kena dibayar berkenaan dengan kemudahan kredit yang diberikan kepada syarikat bernama Bagan Town Development Sdn Bhd ('Bagan Town'). Penyertaan MUI dalam skim persetujuan yang dicadangkan itu telah dibantah oleh syarikat itu atas alasan bahawa MUI tidak termasuk dalam klas pemiutang yang sama dengan pempetisyen dan pemiutang penghakiman yang lain mengikut maksud s 176(1) Akta itu. Telah dihujah untuk syarikat itu bahawa MUI tidaklah sama dengan pemiutang yang lain, yang semuanya pemiutang penghakiman, kerana ia adalah pemiutang bercagar di bawah gadaian undang-undang harta yang diberikan oleh Bagan Town, dan bahawa kemudahan yang diberi kepada Bagan Town telah dijamin selanjutnya oleh surat jaminan yang diberikan oleh syarikat itu. Selanjutnya telah dihujah bagi syarikat itu bahawa jalan keluar bagi MUI adalah untuk memohon perintah untuk penjualan harta yang dicagar di bawah s 256 Kanun Tanah Negara 1965, dan bahawa sehingga ia memulakan prosiding tersebut ia tidak boleh menyertai skim persetujuan yang dicadangkan itu. MUI juga masih belum memulakan tindakan terhadap syarikat itu berasaskan surat jaminan tersebut. Telah dihujah bagi MUI, antara lain, bahawa ianya adalah pemiutang kontingen dan/atau yang tak bercagar syarikat itu.

Diputuskan, menolak bantahan itu:

(1) MUI adalah pemiutang kontingen syarikat itu kerana di bawah surat jaminan itu syarikat itu dikehendaki membayar MUI bila dituntut apa jua jumlah wang yang masih belum dijelaskan oleh Bagan Town sebagai peminjam utama. Walaupun MUI masih belum memulakan tindakan untuk mendapatkan balik hutang yang terhutang di bawah jaminan itu, dari sisi undang-undang ia mempunyai tuntutan wang terhadap syarikat itu.

(2) Perkataan 'creditors' meliputi semua orang yang mempunyai tuntutan yang berhak diterima untuk pembuktian jika syarikat itu digulung. Perkataan itu harus ditafsirkan dengan erti yang paling luas.

(3) Tidak ada bezanya di antara MUI sebagai pemiutang kontingen dan pemiutang yang lain, yang merupakan pemiutang penghakiman. Hak mereka masing-masing tidak berlainan.]

Cases referred to

1 *Sovereign Life Assurance Co v Dodd* [1891–4] All ER 246 (refd)
2 *Re NFU Development Trust Ltd* [1973] 1 All ER 135 (refd)
3 *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 (refd)
4 *In re United Provident Assurance Co Ltd* [1910] 2 Ch 477 (refd)
5 *In re Midland Coal, Coke and Iron Co* [1895] 1 Ch 267 (folld)
6 *Re Glendale Land Development Ltd (in liq)* (1982) 7 ACLR 171 (folld)

Legislation referred to

Companies Act 1965 s 176(1)
National Land Code 1965 s 256
Companies (Consolidation) Act 1908 [UK] s 120

Ooi Teik Hoe (Ooi Lee & Co) for the respondents.
Chen Mun Peng (Chew Tan & Lim) for MUI Finance Bhd.

Cur Adv Vult

Mohamed Dzaiddin J: This is an application by way of notice of motion under s 176 of the Companies Act 1965 ('the Act') for sanctioning a scheme of arrangement between the respondent company and its creditors or any class of them whereby each of the creditors, including the petitioners herein, would accept in full and final discharge and satisfaction of his debt as admitted or established a cash composition equal to 35 cents in every ringgit of such debt as the same would have been provable had the respondents been placed in an insolvent winding-up.

Subsection (1) of s 176 of the Act states:

> Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may on the application in a summary way of the

company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

At the hearing before me on 25 February 1991 all the judgment creditors, about 152 of them including the petitioners, supported the respondents' application. MUI Finance Bhd ('MUI') who had earlier filed a notice of intention to oppose the petition for winding-up changed its mind and supported the application. It claimed to be an unsecured creditor of the respondents by virtue of a letter of guarantee dated 29 October 1984 executed by the respondents guaranteeing the repayment of banking facilities for $5m granted to Bagan Town Development Sdn Bhd. Subsequently, on 14 December 1987 the respondents' liability under the said guarantee was reduced to $2m, and since then the respondents, despite repeated demands made by MUI, had failed to pay the said amount.

However, MUI's participation in the proposed scheme was objected to by Encik Ooi Teik Hoe, counsel for the respondents, who contended that MUI did not come under the same class of creditors as the petitioners and other judgment creditors within s 176(1) of the Act.

On 28 March 1991 I heard submissions of counsel on this point. Encik Ooi submitted that MUI stands in a different class from the petitioners and other creditors because unlike the latter who are the judgment creditors of the respondents, MUI was in fact a secured creditor under the legal charge of the properties given by Bagan Town Development Sdn Bhd which was further secured by a letter of guarantee executed by the respondents. Counsel further submitted that MUI's recourse was to apply for an order for sale of the charged properties under s 256 of the National Land Code 1965, and until it commenced foreclosure proceedings to obtain the order for sale, MUI could not participate in the present scheme of arrangement.

Cik Chen, for MUI, submitted that MUI was an unsecured creditor of the respondents by virtue of the guarantee. Although it had demanded for the repayment of the amount which the respondents had guaranteed for its principal, MUI had yet to commence an action to recover the said debt. In such circumstances, MUI could also be said to be a contingent creditor, who should come within the class of creditors as the other judgment creditors.

I shall now refer to the authorities cited by both counsel to assist me in my deliberations on this point. Encik Ooi first referred me to a passage in *Sovereign Life Assurance Co v Dodd*[1] at p 251 which states as follows:

> The word 'class' used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a 'class of creditors' to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

Counsel next referred me to another passage which was quoted in *Re NFU Development Trust Ltd*[2] at p 140 by Brightman J from the judgment of

Bowen LJ in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*[3] In the course of his judgment, Bowen LJ stated at p 243:

> Then comes the more serious point, whether this is a compromise or arrangement which is within either the words of the section or within the true spirit of the legislation; that is to say, whether the court has either jurisdiction to sanction it, or ought to sanction it. I do not think myself that the point of jurisdiction is worth discussion at much length, because everybody will agree that a compromise or agreement which has to be sanctioned by the court must be reasonable, and that no arrangement or compromise can be said to be reasonable in which you can get nothing and give up everything. A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it. Now, I have no doubt at all that it would be improper for the court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation.

In *Re United Provident Assurance Co Ltd*,[4] it was held that for the purpose of class meetings of members summoned in a winding-up to approve a scheme of arrangement under s 120 of the Companies (Consolidation) Act 1908, holders of shares partly paid with the uncalled balance paid in advance of calls and carrying interest are a different class to holders of fully-paid shares.

Lastly Encik Ooi referred me to a passage in *Palmer's Company Law* (24th Ed) Vol 1 at para 79–11 on what constitutes a class. Perhaps it is relevant to reproduce here the relevant statement:

> If there are different groups within a class the interests of which are different from the rest of the class, or which are to be stated differently under the scheme, such groups must be treated as separate classes for the purpose of the scheme.

Thus, based on the above authorities, Encik Ooi submitted that MUI, not being a judgment creditor, belonged to a different group within a class of creditors as the judgment creditors and as such it should be treated as a separate class for the purpose of the scheme.

Cik Chen referred me to a passage in *Pennington's Company Law* (4th Ed) at p 474 which stated:

> Creditors and members
>
> In all of these kinds of schemes, the term 'creditor' has been given the widest possible meaning by the court, and has been held to include all persons who have, or who will or may have, any pecuniary claim against the company, whether the claim is liquidated or not; and whether it is subject to a contingency or not. (*Re Midland Coal Coke and Iron Co Craig's Claim* [1895] 1 Ch 267.) Thus, the holders of life insurance policies which have not yet matured have been held to be creditors of the insurance company which issued them (*Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573), and a lessee who assigned a lease to a company, and who therefore had a right to be indemnified by it against his continuing liability to the landlord for future rent and future performance of the lessee's covenants, was held to be a creditor of the company in respect of his right to an indemnity. [*Re Midland Coal and Iron Co* (supra).] The interpretation given

> by the court also seems wide enough to include persons who have claims for damages against the company for torts committed by it.

In my opinion, MUI is a contingent creditor of the respondents because under the letter of guarantee the respondents are obliged to pay MUI on demand whatever sum owing by Bagan Town Development Sdn Bhd as the principal borrower. Although MUI has yet to commence action to recover the debt owed under the guarantee, in law MUI has a pecuniary claim against the respondents. In *Midland Coal, Coke and Iron Co*,[5] Lindley LJ, delivering the judgment of the court, stated at p 277:

> Considering that the Act was passed in order to enlarge the powers conferred by s 159 of the Companies Act 1862, we agree that Mr Justice Wright in thinking that the word 'creditor' is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless.

In *Re Glendale Land Development Ltd (in liq)*,[6] McLellan J concluded that 'creditors' embraces all persons with claims which would be entitled to be admitted to proof if the company were wound up.

Based on my consideration of the authorities cited by both counsel, I have come to my conclusion that there is no difference between MUI as a contingent creditor and the rest of the creditors, who are the judgment creditors. I must dismiss any notion that MUI belongs to a different group within a class of creditors simply because it has yet to commence civil action against the respondents to recover its debt under the guarantee. Indeed, I find their rights are not dissimilar. The authorities have emphasized that the word 'creditor' should be interpreted in the widest sense.

Therefore, considering the matter as a whole, in the exercise of my discretion, I overrule the objection of Encik Ooi for the respondents and order that MUI can participate in the proposed scheme of arrangement.

The costs of the proceedings shall be paid by the respondents to MUI to be taxed by the senior assistant registrar.

Order accordingly.

Reported by PS Ranjan